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No. 92-530

IN THE

Supreme Court of the United States

October Term, 1992

THE GEORGE BASCH CO., INC.,
Petitioner,

vs.

BLUE CORAL, INC., SIMONIZ CANADA, LTD.,
and MICHAEL MOSHONTZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether in an action for trade dress infringement under the Lanham Act a plaintiff may recover the profits made by the defendant when there is neither evidence of intentionally deceptive conduct by the defendant nor evidence of actual consumer confusion as to the source of the products at issue.[1]

[1] Petitioner's statement of the Question Presented mischaracterizes the monetary award in this case as "compensatory damages." The amount awarded was not compensatory damages, but an award of the profits made by respondents.

LIST OF PARTIES AND RULE 29.1 STATEMENT

The caption of the case in this Court lists all parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed. The subsidiary corporations of respondent Blue Coral, Inc. to be listed pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States are NicSand, Inc., a 66-2/3% owned subsidiary of Blue Coral, Inc.; Blue Coral Chemical Company, Inc., a 79% owned subsidiary of Blue Coral, Inc.; and Blue Coral International Limited, a 79% owned United Kingdom subsidiary of Blue Coral, Inc. Respondent Simoniz Canada, Ltd. is a 79% owned Canadian subsidiary of Blue Coral, Inc. and has no subsidiary corporations to be listed pursuant to Rule 29.1.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Blue Coral, Inc., Simoniz Canada, Ltd. and Michael Moshontz respectfully request that this Court deny the Petition for A Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 968 F.2d 1532 and is reproduced as Appendix A to the Petition for A Writ of Certiorari. The judgment entered by the United States District Court for the Eastern District of New York and the memorandum and decision of the District Court were not reported and are reproduced as Appendices B and C to the Petition for A Writ of Certiorari.

STATUTE INVOLVED

15 U.S.C. §1117(a)

§1117. Recovery for violation of rights; profits, damages and costs; attorney fees; treble damages

(a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 43(a) [15 USCS §1125(a)], shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 [15 USCS §§1111, 1114], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.[2]

[2] It is fundamental that the constitutional authority for the Lanham Act is derived from the commerce clause (U.S. Const. art. I, §8, cl. 3), not the patent and copyright clause (art. I, §8, cl. 8) as petitioner's statement of the Constitutional Provisions and Statutes Involved indicates. *Ironite Co. v. Guarantee Waterproofing Co.*, 64 F.2d 608, 610-11 (8th Cir. 1933).

STATEMENT OF THE CASE

A. Summary Of Facts

Petitioner The George Basch Co., Inc. ("petitioner") manufactures and distributes a cotton wadding metal polish which it sells under the name NEVR-DULL.[3] The NEVR-DULL trade dress is unremarkable, consisting of a navy blue, 5-ounce cylindrical metal can with simple, horizontal white block lettering and simple red and white graphics. (A-3.)

Respondents Blue Coral, Inc. and Simoniz Canada, Ltd. manufacture and distribute a wadding metal polish called EVER BRITE. Respondent Moshontz is president of both companies.[4] (A-3-4.) The EVER BRITE trade dress consists of depictions of various types of wheels, an angled, silver, grid-like pattern in the background, the name EVER BRITE printed in white block letters in an upward slant, respondents' registered ESPREE trademark printed in yellow directly above the product name, and descriptive wording in yellow below the product name. The base color of the EVER BRITE can is black. (A-4.)

B. Procedural History

In March 1989, petitioner brought this action in the United States District Court for the Eastern District of New York. Petitioner's complaint asserted claims for trade dress infringement under the Lanham Act (15 U.S.C. §1125(a)), unfair competition under New York law, misappropriation of confidential business information,

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[3] A full statement of facts is included in the decision of the Court of Appeals and is incorporated herein by reference. Citations herein are to the decision as reproduced in the Appendix to the Petition for a Writ of Certiorari ("petition").

[4] Hereinafter, Blue Coral, Inc., Simoniz Canada, Ltd. and Mr. Moshontz are collectively referred to as "respondents."

tortious interference with business relationships, and violation of New York General Business Law Sections 349(h) and 368(d). (A-4.) All of these claims were based upon respondents' development and sale of EVER BRITE in a package which petitioner claimed infringed the trade dress of NEVR-DULL.

In May 1990, respondents moved for summary judgment on all of petitioner's claims. The district court entered summary judgment for respondents on petitioner's claim under New York General Business Law Section 349(h) and denied summary judgment as to the other claims. (A-5.)

Petitioner's remaining claims were tried to a jury in July 1991. The district court directed a verdict for respondents on petitioner's claim for misappropriation of confidential business information at the close of petitioner's case. At the close of all the evidence, respondents sought a directed verdict on petitioner's remaining claims. The district court denied respondents' motion, but held that petitioner was precluded from recovering damages for trade dress infringement because petitioner had **conceded** that it could not show actual confusion and there was no evidence that respondents acted with intent to deceive the public. The district court also ruled, however, that notwithstanding petitioner's inability to demonstrate actual confusion or intent to deceive, petitioner would still be entitled to recover respondents' profits if petitioner prevailed on its trade dress infringement claim. (A-5.)

The case was then submitted to the jury by way of special verdict. The jury found that respondents did not tortiously interfere with petitioner's business relationships, but found respondents liable for trade dress infringement and awarded $200,000 in respondents' profits to petitioner. (A-5.)

Respondents moved for judgment notwithstanding the verdict ("JNOV") as to the award of respondents' profits and as to the finding of liability for trade dress infringement.[5] The basis for respondents' JNOV motion was, *inter alia*, that there was no basis for an award of defendants' profits under the Lanham Act because petitioner had shown neither actual confusion nor an intent to deceive. (A-5.)

The district court denied respondents' motion for JNOV and entered a judgment containing the jury's award of $200,000 in respondents' profits and an injunction which required only that respondents change the base color of the EVER BRITE trade dress. (A-28-29, 34.)

Respondents timely appealed from the judgment of the district court and asserted four grounds of error, two of which are relevant here: the award of profits was not proper without evidence of intent to deceive and the award of profits was not proper without evidence of actual confusion.[6] Petitioner cross-appealed, but did not

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[5] Petitioner moved for an award of attorneys' fees under the Lanham Act. The district court denied this motion, holding that this was not an "exceptional case."

[6] Respondents also argued, both in their JNOV motion and on appeal, that the district court, not the jury, should have decided whether and, if so, in what amount petitioner could recover respondents' profits; that the amount of respondents' profits awarded was improper and in excess of respondents' actual profits; that the district court had the power and obligation to correct the amount; and that petitioner had failed to produce evidence sufficient to establish the essential elements of trade dress infringement.

assert as error the district court's ruling that there was no evidence of intent to deceive or actual confusion or any of the district court's instructions to the jury.[7]

The Court of Appeals vacated the jury's award of respondents' profits, holding that such an award was improper absent either proof of intent to deceive or proof of actual confusion. Petitioner now asks this Court to review that decision.[8]

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[7] Petitioner's cross-appeal attacked the district court's denial of its motion for attorneys' fees and the scope of the injunction entered by the district court. The Court of Appeals rejected both of these contentions and petitioner has not sought review of these rulings.

[8] Petitioner's statement of the case cites a portion of Judge Kearse's dissenting opinion which refers to a memorandum offered into evidence by petitioner at trial. That memorandum pertains solely to a chemical analysis of the nonpatented NEVR-DULL product which Blue Coral decided to replicate, and does not in any way relate to the trade dress of either product. (The product is essentially nothing more than unrefined cotton, petroleum distillate and an abrasive.)

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present An Important Or Novel Question Of Law Which Warrants Review By This Court.

In vacating the award of respondents' profits, the Court of Appeals did not address a novel question, create new law or diverge from established precedent; it merely applied principles that are long established and supported by the history and aims of the Lanham Act to the specific facts of this case.

First, the Court of Appeals recognized that, although the Lanham Act makes recovery of a defendant's profits subject "to the principles of equity," this does not mean that no standard exists for such awards beyond a finding of infringement. As this Court has held, profits awards are not, and should not be, the automatic result of a finding of infringement and courts exercising the discretion conferred by this section must operate within legally defined parameters. (A-10.) *See Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 131 (1947) (accounting of defendant's profits will not be ordered "merely because there has been an infringement").[9]

In examining the factual, legal and policy grounds upon which such awards have been based, the Court of Appeals identified three situations in which recovery of profits has been permitted: where the defendant has been unjustly enriched; where the plaintiff has sustained damages from the infringement; and where a profits award is warranted to deter a willful infringer from

[9] *See also Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984) (profits will be awarded "only if certain standards are met"); *Scarves By Vera, Inc. v. Todo Imports, Inc.*, 544 F.2d 1167, 1175 (2d Cir. 1976) (award of profits is not an "automatic concomitant of" grant of injunction).

repeating his infringement. The Court of Appeals recognized that each of these rationales is grounded in the fundamental precept that one who intends to deceive or who causes actual confusion of consumers is more culpable than a mere infringer, and that harsher remedies are appropriate. (A-11-16.)

Noting that the "unjust enrichment" rationale is based on the law of constructive trust whereby a wrongdoer is deemed to hold profits earned at the expense of another in trust for that party, the Court of Appeals adopted the reasoning of many earlier cases that an enrichment is not "unjust" unless the profits of the defendant are attributable to the infringement.[10] Profits are not attributable to the infringement unless they result from consumer confusion between the goods of the plaintiff and those of the defendant. Because petitioner could not show confusion, or intent to deceive which would justify a presumption of confusion, the Court of Appeals concluded that no award of profits could be based upon the unjust enrichment rationale.

The Court of Appeals also considered whether the award of respondents' profits could be supported on the ground that petitioner had sustained damage from the infringement. This rationale required the petitioner to show harm from the infringement (*i.e.*, confusion). Since petitioner stipulated that it had no proof of confusion, the Court of Appeals ruled that the profits award could

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[10] *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259, 261 (1916) (where imitation of mark is fraudulent, plaintiff may recover profits "attributable to defendant's use of the offending mark"); *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d at 772 (unjust enrichment occurs only where defendant's sales are attributable to the infringement (quoting *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 664 (2d Cir. 1970)).

not be upheld on this basis either.[11] Finally, the Court of Appeals correctly recognized that deterrence is a legitimate rationale for allowing recovery of an infringer's profits only where there is intentional deception to deter. (A-16.) When no bad intent exists, there is no culpable conduct to be deterred in the future.

The soundness of the result reached by the Court of Appeals is apparent when the alternative petitioner suggests is considered. If recovery of a defendant's profits were permitted where neither intent to deceive nor actual confusion is shown, unintentional infringers would forfeit profits that were the result of their own industry and effort and were not earned at the plaintiff's expense. Such a rule would encourage marginal lawsuits by plaintiffs who, although not harmed by confusion, would nevertheless be entitled to a windfall award of profits based solely on a finding of infringement. (*See* A-17.) Rather than fostering competition, this result would encourage entrenched market leaders to use trademark litigation as an economic weapon to crush new market entrants.

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[11] *See Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 618 F.2d 950, 955 (2d Cir. 1980); *cert. denied*, 459 U.S. 832 (1982) (in absence of actual confusion, plaintiff may not recover damages or profits); *G.H. Mumm Champagne v. Eastern Wine Corp.*, 142 F.2d 499, 501 (2d Cir.), *cert. denied*, 323 U.S. 715 (1944) (same). Although the Court of Appeals acknowledged some uncertainty in the cases as to whether, in addition to actual confusion, such plaintiffs are also required to show intent to deceive, such uncertainty did not affect the result and does not warrant review, because neither actual confusion nor intent to deceive were shown.

B. The Decision Of The Court Of Appeals Does Not Conflict With The Decisions Of This Court Or The Decisions Of Other Circuits.

The cases cited by petitioner do not demonstrate a conflict of decisions which warrants review by this Court. Indeed, the petition does not contain a single case in which the recovery of profits was upheld where neither intent to deceive nor actual confusion was shown. The cases which petitioner does cite either were decided on fundamentally different facts, do not address the issue before the Court of Appeals, or are consistent in their reasoning with the Court of Appeals. Whatever superficial or semantic differences may exist are not the result of any difference in law or reasoning, but the result of the application of essentially equitable principles to the peculiar facts of each case.

Petitioner mischaracterizes the decision below as denying a Lanham Act plaintiff any monetary relief absent proof of intent to deceive and argues that, for this reason, the decision conflicts with the "commitment" to the protection of trade dress expressed by this Court in *Two Pesos, Inc. v. Taco Cabana, Inc.*[12] In fact, the decision below does not deny plaintiffs monetary relief unless they can prove intent to deceive. The Court of Appeals expressly stated that plaintiffs who can prove actual confusion may recover damages. (A-17.) Petitioner could not do this. Likewise, as the Court of Appeals recognized, plaintiffs who can meet the equitable

[12] 112 S. Ct. 2753 (1992). Of course, there is no substantive conflict between the Court of Appeals' decision and this Court's decision in *Two Pesos* because the only issue decided there was whether secondary meaning is an essential element of a trade dress infringement claim under the Lanham Act. All the decision did was to adopt the same standard for trade dress cases that this Court had previously adopted for trademark cases.

standards that courts have developed for obtaining a profits award may recover the defendant's profits. Petitioner could meet none of these standards either. Thus, the Court of Appeals did not alter the right to monetary relief under the Lanham Act, it merely applied the preexisting standards for such awards to the facts of this case. Although petitioner's inability to prove confusion or intent to deceive foreclosed petitioner from any monetary relief, the Court of Appeals' decision does not do so generally.[13]

Moreover, none of the cases petitioner cites from other circuits conflict with the decision here. In *Louis Vuitton S.A. v. Lee*, 875 F.2d 584 (7th Cir. 1989), the defendants did not unintentionally infringe upon a trade dress; they knowingly and willfully sold counterfeit handbags. By its very nature, a counterfeit product is intended to mislead and designed to cause confusion. The decision is wholly consistent with the decision herein, and the comments in the Seventh Circuit's decision as to "innocent" infringers and profit awards are mere *dicta* which do not evidence conflict or warrant review by this Court. (A-11.)

Like *Louis Vuitton*, *General Elec. Co. v. Speicher*, 877 F.2d 531 (7th Cir. 1989), involved knowing and unauthorized use of another's trademark. Further, the plaintiff therein did not even seek to recover the defendant's profits. *Id.* at 534-36. Obviously, because no award of profits was sought, nothing in the decision can

[13] Nor does the Court of Appeals' decision conflict with this Court's 1942 decision in *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942). First, that case predates the Lanham Act by four years and applied the damages provision from the Trademark Act of 1905. Moreover, that case did not involve unintentional trade dress infringement, but the unauthorized use of a registered trademark. *Id.* at 204. *Cf. Champion Spark Plug*, 331 U.S. at 131.

conflict with the Court of Appeals' determination that the award of profits here could not stand. *Burger King Corp. v. Mason*, 855 F.2d 779 (11th Cir. 1988) was also a case of intentional infringement. There, the defendant was a franchisee who continued to use the franchisor's registered trademarks after he knew that his franchise had been terminated. *Id.* at 780. In upholding an award of profits, the Eleventh Circuit relied upon the same unjust enrichment and deterrence rationales that the Court of Appeals herein identified as supporting such awards. *Id.* at 781.[14]

Finally, the award of profits in *Roulo v. Russ Berrie & Co.*, 886 F.2d 931 (7th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990), is easily justified under either the deterrence or unjust enrichment rationale. Given this, the Seventh Circuit's acknowledgment that the Lanham Act provides no express standard for awarding profits beyond the phrase "principles of equity" does not conflict with the decision here and is no more than a comment on the language of the Act. *Id.* at 941. For over forty years, the courts have developed on a case-by-case basis the meaning of "principles of equity" as that term is used by the Lanham Act. The decision herein does no more than synthesize those prior decisions and apply the principles derived from them to this case.[15]

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[14] *Wynn Oil Co. v. American Way Serv. Corp.*, 943 F.2d 595 (6th Cir. 1991), also involved intentional trademark infringement. Moreover, the Sixth Circuit overturned the district court's refusal to award profits not on any ground pertinent here, but because the district court had refused to award profits since it could not ascertain their exact amount. *Id.* at 606.

[15] The decision of the Court of Appeals herein is in fact consistent with the positions taken repeatedly by the United States Courts of Appeals that have considered the issue. *See, e.g., Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 966 (D.C. Cir. 1990) (award of defendant's profits requires proof that defendant acted willfully or in

(Footnote continued on following page.)

C. The Decision Of The Court Of Appeals Does Not Conflict With The Legislative History Or Intent Of The Lanham Act.

Petitioner also contends that the decision of the Court of Appeals is at odds with the legislative history of the Lanham Act. In support of this contention, petitioner cites general comments as to the purposes of the Act and a Senate Report on the amendment establishing the right to recover attorneys' fees in exceptional cases. Petitioner never explains how the Court of Appeals' decision conflicts with this legislative history.

The first piece of legislative history cited by petitioner is lifted verbatim from Justice Stevens' concurring opinion in *Two Pesos, Inc. v. Taco Cabana* and, like that case, does not address the recovery of a defendant's profits. *See Two Pesos*, 112 S. Ct. at 2764 (Stevens, *J.*, concurring). Congressman Lanham's introductory comments and the statements in the Senate Report that the goal of the Lanham Act is to protect "legitimate businesses" and consumers do not conflict

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(Footnote continued from preceding page.)

bad faith); *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 807 (D.C. Cir. 1987) (award of profits properly denied where no intent to deceive or harm to plaintiff was shown); *Frisch's Restaurants, Inc. v. Elby's Big Boy*, 849 F.2d 1012, 1015-16 (6th Cir. 1988) (award of profits not appropriate where no bad faith was shown and defendant's sales were not attributable to infringement); *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 917-19 (Fed. Cir. 1984) (accounting of defendant's profits is not automatic and is properly denied where no wrongful intent or actual harm to plaintiff is shown); *Raxton Corp. v. Anania Associates, Inc.*, 668 F.2d 622, 625 (1st Cir. 1982) (accounting of profits properly denied where neither actual damages nor willful infringement was shown).

with the decision reached by the Court of Appeals.[16] "Legitimate business" includes the right to compete and to copy products or product concepts that are not protected by patent, copyright or trade secret law. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 153 (1989). In this case, there was no confusion, no consumers were misled and petitioner was not harmed as a result of the competition. As the Senate Report cited by petitioner states, the Lanham Act is meant to protect trademark owners from "pirates and cheats." Defendants who neither intend to deceive consumers nor create confusion while competing are not pirates or cheats.

Petitioner also asserts that the Court of Appeals' decision conflicts with the intent of the amendment which established the right to recover attorneys' fees in "exceptional" Lanham Act cases. Since petitioner has not challenged the decisions below denying its request for attorneys' fees, it is difficult to understand the significance of this assertion. As best respondents can tell, petitioner contends that the Court of Appeals improperly applied the "exceptional case" standard for an award of attorneys' fees to petitioner's claim for profits. *See* 15 U.S.C. §1117(a).

The basis for this apparent theory is a mystery. Absolutely nothing in the decision suggests that the Court of Appeals held or believed that a case must be

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[16] Congressman Lanham's reference to the creation of "uniform legal rights and remedies" refers to the goal of achieving uniformity of rights and remedies nationwide, rather than rights that could differ from state to state. This does not suggest, as petitioner implies, that every plaintiff should be entitled to the same remedy no matter how divergent the facts. Indeed, such a rule would directly conflict with the discretion granted courts under the Lanham Act. *See* Petition at 11.

"exceptional" before profits may be awarded. To the contrary, the Court of Appeals recognized that some equitable consideration, be it unjust enrichment, harm to petitioner, or deterrence, must be proven to justify a profits award.

The fact that the Senate Report on the attorneys' fees amendment uses the words "malicious, fraudulent, deliberate and willful" to describe conduct which might be exceptional does not indicate that the Senate intended to limit a consideration of the defendant's conduct to the issue of whether or not to award attorneys' fees, and intended to make profits awards automatic upon a finding of infringement.[17] If the Senate had wanted to change the long-standing judicial rule requiring proof of more than mere infringement before a defendant's profits may be awarded, it surely would have done so directly.

For decades, the courts have recognized that there is a range of infringing conduct from innocent to exceptional and, for this reason, have developed standards pursuant to the "principles of equity" for determining in a given case whether an injunction, damages, profits, attorneys' fees, or some or all or none of the foregoing, are appropriate. The Court of Appeals herein did nothing novel or extraordinary; it simply applied these long-standing principles.

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[17] *See* Senate Report No. 93-1400, 93d Cong. 2d Sess. 1974, p. 7136.

D. Differences Between Cases Decided Under The Lanham Act And Cases Decided Under The Copyright Or Patent Acts Do Not Warrant Review By This Court.

Petitioner's final argument is that review by this Court is necessary because the Court of Appeals treated the profits award here differently than profits awards are treated under the Copyright and Patent Acts. Given the fundamental differences in the structure of the three statutes and in the nature of the underlying rights each seeks to protect, such differences provide no basis for review by this Court.

Neither Section 504(b) of the Copyright Act (17 U.S.C. §504(b)) nor Section 289 of the Patent Act (35 U.S.C. §289), which establish copyright and design patent owners' respective rights to recover an infringer's profits, makes such awards subject to principles of equity or includes any other requirement beyond infringement. That courts applying these statutes do not apply the same analysis used in cases under the Lanham Act merely reflects the differences in the statutes.

Further, the rights protected by the three statutes are fundamentally different. The Lanham Act protects consumer expectations and legitimate businesses by establishing, and prohibiting infringement of, trademark and related rights. In contrast, the Copyright Act is designed to foster originality and creativity by giving creators the exclusive right to control and exploit copyrightable works for a limited period of time. Similarly, the Patent Act is intended to foster and reward invention and innovation.[18] These differing goals

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[18] *See Harper & Row, Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 545-46 (1985) (copyright); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974) (patent).

are reflected in the fact that, while the copyright and design patent laws provide for monetary relief whenever protectable creativity or invention is usurped, courts applying the Lanham Act are loath to award monetary relief unless the consumer expectations that the Act is intended to protect are affected—in other words, unless deception of consumers is intended or created.

In sum, this case does not present an important new issue, offer this Court the opportunity to rectify a conflict of authority among circuits, or present an issue of importance to a large group of people. It is no more than a case in which the petitioner's proof at trial failed to meet the standard required for the relief that it desired. As such, there is no basis or reason for discretionary review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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